THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 44/2009

HENDRIK PIETER LE ROUX **First Appellant**

BURGERT CHRISTIAAN GILDENHUYS **Second Appellant**

REINARDT JANSE VAN RENSBURG **Third Appellant**

and

LOUIS DEY **Respondent**

Neutral citation: *Le Roux v Dey* (44/2009) [2010] ZASCA 41 (30 March 2010)

Coram: Harms DP, Mlambo and Malan JJA and Griesel and Majiedt AJJA

Heard: 8 March 2010

Delivered: 30 March 2010

Summary: Actio iniuriarum – defamation – humiliation – jest – wrongfulness – animus iniuriandi – consciousness of wrongfulness not required - damages

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Du Plessis J sitting as court of first instance):

The following order is made:

1 The appeal is dismissed with costs, such costs to include the costs of two counsel.

2 The cross-appeal is upheld with costs, such costs to include the costs of two counsel.

3 The order of the court below is amended by substituting para 3 with 'Koste, insluitend die koste van twee advokate'.

JUDGMENT

HARMS DP (MLAMBO and MALAN JJA and MAJIEDT AJA)

[1] This appeal relates to a claim for sentimental damages for the infringement of the dignity (dignitas) and reputation (fama) of the plaintiff, the present respondent, who was a vice principal at a well-known secondary school in Pretoria. The perpetrators were three scholars, the defendants. The high court upheld both claims and awarded a composite amount of R45 000 with costs on the magistrates' courts' scale. With the leave of the trial court the defendants appeal the judgment while the plaintiff cross-appeals the quantum of the award and the costs order.

[2] The claims arose from these facts: the first defendant, who then was fifteen and a half and in grade 9, one evening searched the internet for pictures of gay bodybuilders. He found one. It showed two of them, both naked and their legs astride, sitting next to each other in a rather compromising position – a leg of the one was over a leg of the other – and the position of their hands was indicative of sexual activity or stimulation. He manipulated the photograph by pasting a photo of the

plaintiff's face on the face of the one bodybuilder and the face of the principal of the school onto the other. He also covered the genitals of each with pictures of the school's badge.

[3] He sent the manipulated photo to a friend who, in turn, sent it by cell phone to the second defendant, who was in grade 11 and 17 years old. The picture spread like fire amongst the scholars. A few days later the second defendant showed the picture to a female teacher during class and later decided to print the photo in colour and showed it around on the playground. At his behest and because he did not have the necessary 'guts' the third defendant, who was in the same grade and of the same age, placed the photograph prominently on the school's notice board. A teacher saw it quite soon and removed it.

[4] As a result, the plaintiff instituted an action against them based on the actio iniuriarum, claiming damages for defamation as well as for his humiliation. The facts are fairly uncontentious and the main issues raised by the appeal and cross-appeal concerned (a) wrongfulness; (b) the presence of fault in the form of animus iniuriandi; (c) the quantum of damages; and (d) the appropriate costs order. There is, however, another fundamental question relating to splitting of causes of action that will be dealt with in the course of the judgment. It may be pointed out at this early stage that the first two issues are essentially related to the evidence of the defendants that the publication of the picture was intended as a joke and was perceived as such and that, accordingly, they could not be liable under the actio iniuriarum because their actions were not wrongful and because they did not have the intent to injure the plaintiff (a lack of animus iniuriandi).

DEFAMATION: WRONGFULNESS

[5] I begin with the defamation claim. The first matter to consider is the wrongfulness of the publication of the manipulated photo. It is well established that the determination of whether a publication is defamatory and therefore prima facie wrongful involves a two-stage inquiry. (I use the word 'publication' to include a pictorial representation such as a photograph.) The first is to determine the meaning

of the publication as a matter of interpretation and the second whether that meaning is defamatory.[1]

[6] To answer the first question a court has to determine the natural and ordinary meaning of the publication:[2] how would[3] a reasonable person of ordinary intelligence have understood it? The test is objective. In determining its meaning the court must take account not only of what the publication expressly conveys, but also of what it implies, ie, what a reasonable person may infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning that flows from knowledge of special circumstances. Meaning is usually conveyed by words but a picture may also convey a message, sometimes even stronger than words.

[7] It may be accepted that the reasonable person must be contextualised and that one is not concerned with a purely abstract exercise.[4] One must have regard to the nature of the audience. In this case the main target was the school children at the particular school but it also included at least teachers.[5]

[8] A publication is defamatory if it has the 'tendency' or is calculated to undermine the status, good name or reputation of the plaintiff.[6] It is necessary to emphasise this because it is an aspect that is neglected in text-book definitions of defamation because it is usually said that something can only be defamatory if it causes the plaintiff's reputation to be impaired.[7] That is not the case, as Neethling explains with reference to authority:[8]

'It is notable that the question of a factual injury to personality, that is, whether the good name of the person concerned was actually injured, is almost completely ignored in

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[1] F D J Brand 'Defamation' in 7 *Lawsa* 2 ed para 237.
[2] *Argus Printing & Publishing Co Ltd v Esselen's Estate* [1993] ZASCA 205; [1994] 2 All SA 160 (SCA); 1994 (2) SA 1 (A) at 20E-21B.
[3] Corbett CJ used the word 'might' because he was dealing with an exception. At the trial stage the test is different. To the extent that *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] ZASCA 64; [2004] 3 All SA 511; 2004 (6) SA 329 (SCA) para 25 might have applied the 'might' test at the trial stage it erred. The perceived error had no effect on the outcome of the case.
[4] *Mthembi-Mahanyele v Mail & Guardian Ltd* para 26.
[5] *Mohamed v Jassiem* [1995] ZASCA 115; 1996 (1) SA 673 (A).
[6] J Neethling et al *Neethling's Law of Personality* 2 ed (2005) p 131, *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA); [2002] 1 All SA 311 (A).
[7] J Burchell *The Law of Defamation in SA* (1985) p 34-35 contains a collection. I shall refer to this work as 'Burchell I'.
[8] Supra p 136.

the evaluation of wrongfulness of defamation. In fact, generally[9] a witness may not even be asked how he understood the words or behaviour. In addition, it is required only that the words or behaviour *was calculated* or *had the tendency or propensity* to defame, and not that the defamation actually occurred. In short, *probability of injury* rather than actual injury is at issue. It can be concluded, therefore, that the courts are not at all interested in whether others' esteem for the person concerned was in fact lowered, but only, seen *objectively*, in whether, in the opinion of the reasonable person, the esteem which the person enjoyed was adversely affected. If so, it is simply accepted "that those to whom it is addressed, being persons of ordinary intelligence and experience, will have understood the statement in its proper sense".'

[9] It is often said that jest may exclude animus iniuriandi, something to which I shall return.[10] *Masch v Leask,*[11] however, held that jest could be a defence only if it was something that would have been understood by the reasonable person as jest – 'if a man says that the words were used in jest, he must prove that it could be taken up in no other light by a reasonable person.' Melius de Villiers, like so many before (such as Voet 47.10.8)[12] and after him (including this court), did not distinguish clearly between wrongfulness and animus iniuriandi in his classical work on iniuriae.[13] Ignoring this failure, his views on jest in the present context are illuminating. He drew a distinction between legitimate jest and jest that is not legitimate. Jest is not legitimate, he said, when in order to amuse yourself or to show off your wit, you say or do things which, considering the occasion or personal circumstances of another, would be insulting, offensive or degrading.

[10] It appears to me that if a publication is objectively and in the circumstances in jest it may not be defamatory.[14] But there is a clear line. A joke at the expense of someone – making someone the butt of a degrading joke – is likely to be interpreted as defamatory. A joke at which the subject can laugh will usually be inoffensive.

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[9] The author explains that the exception applies to an alleged innuendo only, something not relevant to this case.
[10] Eg *Herselman NO v Botha* [1993] ZASCA 144; [1994] 1 All SA 420 (A); 1994 (1) SA 28 (A) at 35E.
[11] 1916 TPD 114 at 116.
[12] Johannes Voet is an institutional writer on Roman-Dutch law. The reference is to his *Commentarius ad Pandectas*, a commentary on the Digesta of Justinian. The standard English translation of Voet is that of Percival Gane.
[13] *The Roman and Roman-Dutch Law of Injuries* (1899) p 195.
[14] Compare *Jansen Van Vuuren & another NNO v Kruger* [1993] ZASCA 145, [1993] 2 All SA 619 (A); 1993 (4) SA 842 (A) at 855B-856G.

[11] In determining whether a publication is defamatory regard must be had to the person who was allegedly defamed. What may be defamatory of a private individual may not necessarily be defamatory of a politician or a judge. By virtue of their public office they are expected to endure robust comment but that does not imply that they cannot be defamed or should not be entitled to turn to courts to vindicate unjustifiable attacks on their character.[15] This is to a lesser extent also true of teachers. They must expect to be the subject of robust comment and the butt of jokes by scholars but, once again, there is a line that may not be crossed because they, too, have the right to reputation and dignity, which must be protected.

[12] The plaintiff alleged that the publication was per se defamatory and in the alternative alleged in effect that the photo implied that he masturbated in the presence of another, was guilty of immoral exposure, had a low moral character, had a homosexual relationship with the principal, or was homosexual. He did not rely on an innuendo.

[13] The learned judge, in determining the objective 'message' conveyed by the publication, held that although it was obvious that the faces did not belong to the bodies, the transposition of the faces onto the bodies associated the two teachers with the bodybuilders and their behaviour. They were busy with some sexual activity (even though one could not see what the two men did because of the positioning of the school badges) and that the photo created the impression that the two figures have low moral values and immodest sexuality.

[14] As to the question whether the publication was defamatory, the learned judge said that the reasonable person would have viewed the photo through the lens of the Constitution, more particularly s 10, which provides that everyone has the right to have their dignity respected and protected; s 14, which guarantees the right to privacy; and s 9(2) and (3), which demand that everyone's sexual orientation should be respected. The publication raises questions about the plaintiff's sexuality and sexual orientation, he said. It ridicules the plaintiff's moral values and disrespects his person. However, the sexual orientation itself, he said, is of little moment because

[15] *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23C-29A; *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511, 2004 (6) SA 329 (SCA) paras 33-43.

the ridicule would not have been different if the other person had been a female member of staff.

[15] The defendants' counsel attacked these findings on a number of grounds. His main argument was that the implicit meaning, especially the association between the plaintiff and the bodybuilders, had not been pleaded. The answer is that interpretation is for the court and need not be pleaded. Meaning, express or implied, is a matter for argument and not evidence. It is also not understood where this technical argument was supposed to lead. Counsel sought to rely on evidence that this is not how the picture was perceived and also on evidence that one or two persons who had seen the picture did not believe that it reflected the true relationship between the two teachers or that they did not think less of the plaintiff as a result of the publication. As mentioned above, all this is beside the point. Interpretation is an objective issue. Actual loss of reputation is not required, nor is belief in the defamation.

[16] Something was also made of the fact that the defendants were school children and that the reasonable person would have taken that into account in assessing the meaning of the photo. I have some difficulty in appreciating how the identity of the alleged defamer can determine the objective meaning of a publication. The picture was created and distributed anonymously. Its origin down the line would not have been known since it was in the nature of a chain letter. An addressee may or may not have suspected that children were behind it all but there was no reason for them to have accepted that as a fact.

[17] The picture was not published in isolation. There was a background to it. The plaintiff's name rhymes with 'gay', and a ditty based on this association and a pamphlet with the same tenor was in circulation amongst the children. This background, which probably led to the creation of the photo and its publication, is relevant in determining its meaning.[16] Counsel also argued that although the publication would have been defamatory if, say, a parent or minister of religion had been portrayed in this manner it cannot be defamatory of a teacher because he is a

[16] *Geyser & 'n ander v Pont* [1968] 1 All SA 43 (W); 1968 (4) SA 67 (W) at 69E-H.

person in authority. I mention this submission only because it was repeatedly made and not because it deserves judicial consideration.

[18] There is nothing that, objectively speaking, indicates that the photo was perceived as a joke, let alone a legitimate one. Counsel could not explain the joke. People may have laughed, just as they laughed at someone being pilloried – not because it was funny but because of the humiliation of the victim. Schadenfreude, the Germans would have called it. Laughter remains a curious psychological phenomenon. Sigmund Freud divided jokes into two broad categories: 'innocent' jokes and 'tendentious jokes. Innocent jokes are jokes without an underlying hostility and do not evoke laughter at the expense of anyone in particular. 'Tendentious' jokes are jokes made with aggressive or sexual provocations, to elicit strong emotional response. The philosopher Alfred M Stern, for instance, argues that we laugh at degraded values, or in order to degrade values. He said:[17]

'In my theory, laughter is interpreted as a value judgment, an instinctive, negative value judgment concerning a degradation of values. This judgment is not expressed in words, but in the inarticulate sounds we call laughter. Laughter, however, is not only our reaction towards a degradation of values. Sometimes it is also an action provoking a degradation of values or, at least, trying to provoke it. When we laugh at a person, or a thing done by a person, although no value degradation can be found in them, we try to degrade their value. And often we succeed.

There is a French saying, *le ridicule tue*, the ludicrous kills. Of course, it does not kill physically, but it may kill morally, axiologically; it may kill values, and then laughter may have tragic consequences.

If we laugh at a serious person or his work, this person is offended. And he is right to be offended, for instinctively he recognizes in this laughter an attempt to degrade his value or that of his work in the eyes of other people.'

This accords with the views expressed by the anonymous author of the title 'Humour and Wit' in 9 *Encyclopaedia Britannica* p11:

'Humour today seems to be dominated by two main factors: the influence of the mass media and the crisis of values affecting a culture in rapid and violent transition. The

[17] 'Why do we laugh and cry?' *calteches.library.caltech.edu/154/01/stern.pdf.* (Accessed on 15 March 2010.) For a detailed discussion see the article 'Comedy' in 4 *Encyclopaedia Britannica* 15 ed.

former tends toward the commercialized manufacture of laughter by popular comedians and gags produced by conveyor-belt methods; the latter toward a sophisticated form of black humour larded with sick jokes, sadism, and sex.'

In fairness to counsel, his ultimate submission was that although the photo was not objectively funny, it would have been for scholars who would have enjoyed the photo because it held the plaintiff up to ridicule, something I would have thought means that they would have interpreted the photo as being defamatory. As the learned judge said, even adolescents know where to draw the line between jest and ridicule.

[19] I therefore conclude that the photo was defamatory of the plaintiff and that its publication was wrongful. It matters not for this conclusion what his sexual orientation was or what the sex of the other person on the photo was because it deals with his sexual orientation in a derogatory manner.[18] It ridicules him, his moral values and disrespects his person.

A DIVERSION: SPLITTING OF ACTIONS.

[20] The plaintiff's second cause of action was for the impairment of his dignity flowing from the publication. The term 'dignity' covers a number of concepts in s 10 of the Constitution but in the present context we are concerned with the plaintiff's sense of self-worth. Melius de Villiers[19] spoke of the inborn right to the tranquil enjoyment of one's peace of mind; and the valued and serene condition in one's social or individual life which is violated when one is subjected to offensive and degrading treatment, or exposed to ill-will, ridicule, disesteem or contempt.

[21] The plaintiff gave extensive evidence of how the publication of the photo had affected and humiliated him. It placed him in an invidious position as deputy principal who was responsible for religious events and educating and upholding morals at the school. The court below upheld this claim but, as mentioned, did not make a separate award of damages in respect thereof. This led to a major attack on the award by the plaintiff in the course of the cross-appeal. The defendants, on the other

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[18] J Burchell *Personality Rights and Freedom of Eexpression: the Mmodern Actio Iniuriarum* (1998) p 184 n 4 (hereinafter 'Burchell II').
[19] Op cit p 24-25.

hand, attacked the judgment on the grounds that it should have held that plaintiff's dignity was not impaired or because they lacked animus iniuriandi.

[22] There is, however, an anterior question that has to be considered: can the same act give rise to two actiones iniuriarum in the hands of the same plaintiff? To illustrate, an assault gives rise to an actio iniuriarum. Does a humiliating assault give rise to an additional action for the impairment of dignity? Or does the nature of the assault simply impact on the quantum of damages? I believe that the answer to this example is on consideration evident: there is only one cause of action.

[23] I am unaware of any instance in the history of the actio iniuriarum where a particular defamatory act gave rise to two causes of action. (I exclude the cases where patrimonial damages are also claimed.) The reason is in my view that any defamation is in the first instance an affront to a person's dignity which is aggravated by publication. Someone who is not affronted by a publication and who does not feel humiliated will not sue for defamation.[20] That is why the award of damages compensates 'the plaintiff for injured feelings and for the hurt to his or her dignity and reputation.'[21] As F P van den Heever J once said, 'an action on defamation has several purposes: to kill libel, to recover a solatium for injured feelings and to recover a penalty from the slanderer'.[22] In other words, in assessing compensation in a defamation case a court must have regard to the effect the publication had on the plaintiff.[23] In *Gelb v Hawkins*[24] this court's determination of compensation in a defamation case was said to relate 'in the main to *contumelia*,[25] but does not overlook the elements of loss of reputation, and penalty', which means that on the facts of the case the plaintiff's humiliation and not loss of reputation was the major factor in deciding quantum.[26]

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[20] Compare Voet 47.10.19 in a somewhat different context.
[21] 7 Lawsa 2 ed para 260. See also *SA Associated Newspapers Ltd & 'n ander v Samuels* [1980] 3 All SA 227 (A); 1980 (1) SA 24 (A) at 39F-G read with 40B.
[22] *Kriek v Gunter* 1940 OPD 136 at 144.
[23] *Muller v SA Associated Press* 1972 (2) SA 589 (C) at 595A.
[24] [1960] 3 All SA 371 (A); 1960 (3) SA 687 (A) at 693H.
[25] Which means contempt or insult.
[26] Also *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & others* [2001] 1 All SA 425 (A); 2001 (2) SA 242 (SCA) at 260H.

[24] Risking the wrath of those who believe that our law of defamation has not been contaminated by the common law, I believe that the following statement by Windeyer J encapsulates what I wish to say:[27]

'It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is[,] simply because he was publicly defamed. For this reason, compensation by damages operates in two ways as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather that a monetary recompense for harm measurable in money. The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of inextricable considerations.'

[25] I therefore conclude that the plaintiff's additional claim based on the affront to his dignity was ill-founded and does not require further consideration and I proceed to consider the second leg of the defamation claim, namely animus iniuriandi.

DEFAMATION: ANIMUS INIURIANDI

[26] It is trite that delictual liability depends in general terms on fault which, in the case of defamation and all other iniuriae, is fault of a particular nature, namely animus iniuriandi. As mentioned, the defendants say that they did not have the intention to defame the plaintiff because their intention was to make a joke and, in any event, they did not know that there was such a thing as defamation. It was not always clear from the evidence whether the defence was one of legal incapacity due to the inability to distinguish between right and wrong but it was not argued that the presumption of legal capacity was rebutted.[28]

[27] To assess the defence of lack of animus iniuriandi it is necessary once again to visit the issue as to its meaning and application in the context of the actio iniuriarum in its different forms. Much has been said in judgments and academic works on the issue and my failure to refer to many of them is not due to a lack of respect but only because I do not wish to clutter this judgment unduly.

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[27] *Uren v John Fairfax & Sons Pty Ltd* 117 CLR 118 (HC of A) 150. A part of the quotation appears in Burchell I p 292.

[28] Melius de Villiers op cit p 29-30.

[28] Our Roman-Dutch writers did not distinguish clearly or consistently between wrongfulness and animus iniuriandi (or dolus malus). This gave rise to much confusion. In any event, animus iniuriandi means the intention to injure. That is how this court has understood the concept since at least *Whittaker v Roos and Bateman*.[29] This is also the meaning attached to the term by early proponents of animus iniuriandi as an essential element of defamation, Melius de Villiers,[30] Prof D Pont[31] and Prof T W Price.[32]

[29] The Continental Pandectists of the 19th Century analysed the concept of dolus and added another element to the intention to injure, namely consciousness of the wrongfulness of the act (coloured intent or 'wederregtelikheidsbewussyn').[33] In spite of my high regard for them it has to be conceded that by systemising the Roman law concepts they did not necessarily state the Roman-Dutch law. This means that an adherence to the roots of our law does not necessarily require an adoption of Pandectist theories.

[30] Legal theory is important but law is not a natural science and, as Oliver Wendell Holmes Jnr had said, 'the life of the law has not been logic; it has been experience'[34] and that 'general propositions do not decide concrete cases.'[35] Prof J C van der Walt once referred to the poet and philosopher N P van Wyk Louw who spoke of the 'spookagtige dans van logiese kategorieë' and indicated that although general rules are on the one hand necessary for legal certainty they may on the other hand impede justice:[36]

'Daar bestaan dus 'n ewige, inherente spanningsverhouding tussen die eise van regverdigheid en regsekerheid. . . . Die reg kan dus vanweë sy inherente kompromiekarakter nooit volkome seker of regverdig wees nie.'

The *bon mot* of Holmes must, nevertheless, be seen in context. It was not a call for irrational judging or an abandonment of general principles or consistency. As Max

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[29] 1912 AD 92 at 124-125. I do not intend to list the annotations on this statement.
[30] '*Animus iniuriandi*: An essential element in defamation' 48 (1931) *SALJ* 308.
[31] Case note in 1940 *THRHR* 270 at 278-279.
[32] '*Animus iniuriandi* in defamation' 66 (1949) *SALJ* 4 at 6 and 26.
[33] J R Midgley and J C van der Walt 'Delict' in 8(1) *Lawsa* 2 ed para 105 n 3.
[34] *The Common Law* (1881) p 1.
[35] *Lochner v New York* (1905) 198 US 45 at 76.
[36] 'N P van Wyk Louw: Enkele konsekwensies vir die regsdenke' 1986 *TSAR* 257 at 268.

Rheinstein explained in his introduction to Max Weber's *Law in Economy and Society*:[37]

'Not only the context in which this famous passage appears but Holmes's entire life and work should have made it clear that he would have been the last to disparage logical thinking, that is, thinking which tries to avoid intrinsic contradiction and to maintain consistency within a given line of argumentation. Clearly, Holmes was also far from disparaging the use of concepts. Thinking without concepts is as unthinkable as painting without paints or making music without sounds. The only problem is what sort of concepts we use or, from what premises we start when we begin to think. This is what Holmes means: that we derive our premises from the experience of life rather than formulating them as artificial and purely formal concepts.'

[31] Probably the first reference to coloured intent in our legal literature is to be found in the first edition of *Strafreg* by J C de Wet and H L Swanepoel (p 91). The authors, significantly, did not pretend to find the concept in our law but relied exclusively on Dutch and German textbooks that were current at the time (1949). In the delictual context the first reference to the requirement (at least to my knowledge) appeared in N J van der Merwe and P J J Olivier's 1966 edition of *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (p 72 and 75). The authors must have thought that the matter was self-evident because they did not rely on any authority for their statement.

[32] This court in *O'Malley*[38] accepted that coloured intent formed an essential part of animus iniuriandi for purposes of defamation. The statement was in context obiter and it will be recalled that this case created an exception to the general requirement of animus iniuriandi by holding that the public media could not escape liability by relying on its absence. The ratio was later overruled in *Bogoshi*.[39] As far as iniuria in general is concerned, Jansen JA sought to hold in *Ramsay*[40] that coloured intent was a general requirement but the majority (per A S Botha AJA) held otherwise.[41] It held, significantly, that whether or not coloured intent should be required for any

[37] Simon & Schuster 1954 at p xlvi in the 1967 paperback edition.

[38] *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* [1977] All SA 631 (A); 1977 (3) SA 394 (A) at 403C-D.
[39] *National Media Ltd v Bogoshi* [1998] 4 All SA 347 (SCA); 1998 (4) SA 1196 (SCA).
[40] *Ramsay v Minister van Polisie & andere* [1981] 4 All SA 692 (A); 1981 (4) SA 802 (A).
[41] Supra at 817F-819C.

particular iniuria is a matter of legal policy and, by implication, not a matter of legal philosophy.

[33] To test the correctness of the assumption that colourless intent is a valid defence in the case of iniuria it is useful to consider the case law in this regard. One seeks rather in vain for an instance where the defence was accepted.[42] The opposite is true. It is not a defence in the case of invasion of privacy,[43] unlawful arrest or detention,[44] assault,[45] defamation by the press,[46] or wrongful attachment.[47]

[34] Malicious prosecution appears to be an exception because it has been held firmly that coloured intent is a requirement for liability.[48] The interesting aspect of this cause of action is that it is probably the only iniuria where the plaintiff must prove animus iniuriandi instead of the defendant having to prove its absence. This, and the common name of the action, indicates that there is something special about this cause of action. It appears to me that this is an instance where coloured intent forms part of the wrongfulness element: public policy considerations demand that a plaintiff should only be compensated for a prosecution that was instigated without reasonable or probable cause if, in addition, it was 'malicious' (in the sense of coloured intent). The practical effect of this might be that a further inquiry into the fault element may become unnecessary because it has already been established by the plaintiff and there is accordingly nothing for the defendant to disprove.

[35] Aquilian causes such as intentional interference with contractual relationships and injurious falsehoods have been explained on the same basis. The theoretical problem with these is that the general requirement of fault under the lex Aquilia is negligence while they require dolus or animus iniuriandi. This court held in *Gore*[49] that animus iniuriandi is in these instances a requirement for wrongfulness because

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[42] The authorities relied on by Neethling op cit p 197 n 75 do not bear out the statement that colourless intent is a defence in cases of an invasion of dignity.
[43] *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 306A-F.
[44] *Minister of Justice v Hofmeyr* [1993] 2 All SA 232 (A); 1993 (3) SA 131 (A) at 154–157; *Ramsay v Minister van Polisie* [1981] 4 All SA 692 (A); 1981 (4) SA 802 (A) at 818.
[45] *Bennett v Minister of Police* [1980] 3 All SA 817 (C); 1980 (3) SA 24 (C).
[46] *National Media Ltd v Bogoshi* [1998] 4 All SA 347 (SCA); 1998 (4) SA 1196 (SCA).
[47] *Coetzee (Sheriff, Pretoria East) v Meevis* [2001] 1 All SA 10 (SCA), 2001 (3) SA 454 (SCA).
[48] *Rudolph & others v Minister of Safety and Security & another* [2009] ZASCA 133; [2009] 3 All SA 323; 2009 (5) SA 94 (SCA) para 18.
[49] *Minister of Finance & others v Gore NO* [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA). For criticism of the terminology used: J Neethling and J M Potgieter 'Middellike aanspreeklikheid vir 'n opsetlike delik' 2007 *TSAR* 616.

public policy considerations demand that a plaintiff should be compensated for an interference with contractual relationships only where the interference was accompanied by coloured intent.[50]

[36] Reverting to defamation, the defence of privileged occasion provides another illustration.[51] The plaintiff may prove that, although the defendant had published the statement on a privileged occasion, he had overstepped the mark by having spoken animo iniuriandi in the sense of coloured intent. Although this is usually said to be part of the fault investigation it is indeed part of the investigation into wrongfulness and a close reading of the cases dealing with privileged occasions, beginning with *Jordaan v van Biljon*[52] and *Craig v Voortrekkerpers Bpk*,[53] confirms this conclusion.

[37] A purely Pandectist approach does get one into a bind. This was even recognised by De Villiers AJ in the commendable judgment in *Maisel v van Naeren,*[54] which gave rise to the whole debate.[55] It appears to me to be incongruous that a defendant who, for example, cannot establish truth and public benefit to justify defamation, can nevertheless escape liability by relying on a belief in either the truth or public benefit. Not only that, the approach also inhibits the development of this part of the law under the Constitution. Van Dijkhorst J, not surprisingly, sought to develop the common law in this regard by holding that a lack of coloured intent could not be a defence if it was due to negligence,[56] a view similar to that of F P van den Heever J,[57] Colman J,[58] P Q R Boberg[59] and Burchell.[60]

[38] It might be opportune to revisit with the wisdom of hindsight the judgment in *Bogoshi.*[61] The judgment was primarily concerned with the correctness of *O'Malley*,

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[50] *Dantex Investment Holdings Pty Ltd v Brenner & others NNO* [1988] ZASCA 122; [1989] 1 All SA 411 (A); 1989 (1) SA 390 (A) at 396G-I.
[51] Anton Fagan 'Rethinking wrongfulness in the law of delict' 122 (2005) *SALJ* 90 at p 99 deals with this issue.
[52] [1962] 1 All SA 350 (A); 1962 (1) SA 286 (A).
[53] 1963 (1) SA 149 (A). The same applies to *Nydoo & andere v Vengtas* 1965 (1) SA 1 (A)
[54] 1960 (4) SA 836 (C) at 850E-H.
[55] Burchell II p 308.
[56] *Marais v Groenewald* [2000] 2 All SA 578 (T); 2001 (1) SA 634 (T) at 646F-G.
[57] *Kriek v Gunter* 1940 OPD 136.
[58] *Hassen v Post Newspapers (Pty) Ltd & others* [1965] 3 All SA 528 (W); 1965 (3) SA 562 (W) at 570G-H.
[59] '*Animus iniuriandi* and mistake' 88 (1971) *SALJ* 57.
[60] Burchell I p 166-174.
[61] *National Media Ltd v Bogoshi* [1998] 4 All SA 347 (SCA); 1998 (4) SA 1196 (SCA). For those learned authors who have criticized this court for having failed to decide the case under the interim

which had held that the press could not rely on a lack of *animus iniuriandi* as a defence in a defamation case. The judgment also dealt with the anterior question of justification: the publication of a defamatory statement will be lawful if it was reasonable in the circumstances of the case. In other words the general criterion of reasonableness determines whether a defamatory publication was wrongful or not.[62] 'Reasonableness' in this context must not be conflated with negligence.[63] If justifiable, the question of fault cannot arise. I agree in this regard with Lewis JA[64]:

'However, fault need not be in issue at all if in the particular circumstances anterior inquiry shows that the publication is lawful because it is justifiable. *Bogoshi* indicates that the reasonableness of the publication might also *justify* it. In appropriate cases, a defendant should not be held liable where publication is justifiable in the circumstances – where the publisher reasonably believes that the information published is true. The publication in such circumstances is not unlawful. Political speech might, depending upon the context, be lawful even when false provided that its publication is reasonable. . . . This is not a test for negligence: It determines whether, on grounds of policy, a defamatory statement should not be actionable because it is justifiably made in the circumstances.'

It appears that on this analysis the discussion of negligence in *Bogoshi* might have complicated matters unnecessarily. Once it is found that the publication was unreasonable the next question should simply be whether it was published with the intent to injure.[65]

[39] The effect of this is that mistake or bona fides might in appropriate circumstances justify a defamatory statement (ie, if it was reasonable to have been made) and that it is accordingly not necessary to require coloured intent. I therefore conclude, especially in view of precedent and the constitutional emphasis on the

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Constitution of 1994, it could be mentioned that the defamatory articles complained of, as the judgment indicates, mostly pre-dated its adoption.

[62] Burchell II p 207-208.

[63] See the discussion by J Neethling and J M Potgieter 'Wrongfulness and negligence in the law of delict: a Babylonian confusion?' 2007 (70) *THRHR* 120 and the cases referred to. See also the debate between J Neethling 'The conflation of wrongfulness and negligence: is it always such a bad thing for the law of delict?' 123 (2006) *SALJ* 204 and R W Nugent 'Yes, it is always a bad thing for the law: a reply to Professor Neethling' 123 (2006) *SALJ* 557. Further Anton Fagan 'Blind faith: a response to Professors Neethling and Potgieter' 124 (2007) *SALJ* 285.

[64] *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511; 2004 (6) SA 329 (SCA) para 47 discussed by J Neethling 'Die locus standi van 'n kabinetsminister om vir laster te eis, en die verweer van redelike publikasie van onwaarheid op politieke terrein' 2005 (68) *THRHR* 321.

[65] J Neethling 'Aanspreeklikheid van die massamedia weens laster: die nalatigheidsvraag' 2004 *TSAR* 406.

protection of personality rights, that the animus iniuriandi requirement generally does not require consciousness of wrongfulness (wederregtelikheidsbewussyn).[66]

[40] In addition, and *pace* the obiter in *Herselman NO v Botha* (mentioned earlier to which I was a party) and authors such as Neethling,[67] I do not believe that jest excludes the intention to injure. It goes to motive and, as Melius de Villiers said,[68] if a joke is degrading the defendant's motive does not matter.

[41] The court below found that since the defendants knew that what they did was wrong in the general sense, they indeed did have the required coloured intent in the sense of consciousness of wrongfulness. Although the factual finding was fully justified I have some difficulty with the conclusion because it could confuse moral and legal blameworthiness. It is sufficient to rely on counsel's concession, correctly made, that the defendants' intention was to ridicule the plaintiff. This means that the defendants are liable. The remaining issues are quantum and costs.

QUANTUM

[42] As mentioned, the court below awarded R45 000 to the plaintiff. Assessment of compensation is a matter for the trial court and a court of appeal may interfere under limited circumstances only. One is where the court had misdirected itself on a material issue. The parties were agreed that the court indeed misdirected itself. It dealt with the matter as if the assessment of quantum was similar to the determination of sentence in a criminal case.[69] Factors taken into account were that the perpetrators should not at this young age be burdened with a debt that might affect their future; and that their interests should be considered. This misdirection may require a re-assessment of quantum. The defendants argue that the amount should be reduced while the plaintiff, who had claimed R300 000 in relation to each of the two 'delicts', argued for a substantial increase.

[43] The defamation and consequent humiliation was in my view serious. The publication was, on the probabilities, widespread under the scholars. The photo may still be available on many a cell phone or computer and there is no reason to believe

[66] It should be clearly understood that this judgment does not deal with crimen iniuria or with dolus in criminal law where other policy considerations may apply.
[67] Op cit p 165-166.
[68] Op cit p 195.
[69] *Mogale & others v Seima* [2005] ZASCA 101; 2008 (5) SA 637 (SCA) para 11.

that the dissemination has stopped. The plaintiff was known to the audience; and his position of authority was materially undermined. He had reason to suspect that he became the laughing stock of the school.

[44] The plaintiff submitted that because the right to dignity is now a protected right in terms of the Constitution, this justifies a new approach to quantum because, as counsel said, the values underlying the Constitution are not otherwise appropriately protected. The problem with the argument is that it assumes that the common law on defamation is deficient and that one is entitled, albeit indirectly, to constitutional damages. It also ignores the fact that there are many rights guaranteed in the Constitution and if one were to re-assess the 'monetary' value of one the others, such as free speech, might be implicated.[70]

[45] An apology impacts on quantum and the defendants submit that they sought to apologise to the plaintiff but that he refused to speak to them on the advice of his lawyers. The evidence of the defendants on their attempted apology appears to me to be somewhat suspect.[71] However, the attempt was made long after the event on the advice of a third party. The manner in which they conducted their defence during the trial and the manner in which they gave evidence indicate clearly that they were disrespectful towards the plaintiff, had no remorse, and did not wish to apologise. They justified their arrogance on the basis that the plaintiff should not have taken offence at what they did, and that he should have been content with the disciplinary steps that had been taken by the school and the community service to which they had been subjected. I agree with plaintiff's counsel that all this was aggravating.

[46] The court below had regard to the impact of the publication on the plaintiff's dignity but, said his counsel, insufficiently so. As mentioned, the plaintiff gave extensive evidence on this. It was one of the considerations he took into account in moving to another school. I do not wish to elaborate. It is clear that the plaintiff is a sensitive person but he may have taken this matter too much to heart. In my view one cannot assess quantum subjectively. One must have regard to the probable consequences for someone in the position of the plaintiff. In other words, the

[70] Compare *Mogale & others v Seima* 2008 (6) SA 637 (SCA) para 9.
[71] Compare *Tsedu & others v Lekota & another* [2009] ZASCA 11; [2009] 3 All SA 46 (SCA); 2009 (4) SA 372 (SCA) para 21-24.

determination must be objectively justifiable.[72] I am not convinced that the court below erred in this regard.

[47] The last aspect that I wish to address in this context is whether the fact that the defamers were school children and the defamed their teacher has an impact on quantum. In other words, should the plaintiff not have taken the publication from whence it came? To illustrate: is an allegation by a dissatisfied litigant that a judicial officer was dishonest less serious than a similar allegation by the minister of justice? I think that the question has to be answered in the affirmative because it is less likely that the allegation by the litigant would be taken seriously by an objective person. In other words, although the source cannot affect the defamatory nature of the statement it might affect the award.

[48] After anxious consideration I have come to the conclusion that in spite of the misdirection the award of the court below was fair in all the circumstances. I may have awarded more but since my award would not have been substantially more an interference cannot be justified. It should be remembered that there was a countervailing misdirection because the court had upheld the loss of dignity claim as a separate claim, which might have affected his assessment. I do recognise that the plaintiff may eventually be out of pocket due to the cost of litigation but defects in the costs structure cannot be rectified through awards of damages.

COSTS

[49] As mentioned, the court below ordered costs on the magistrates' courts' scale. This means, if regard is to be had to the amount awarded, that the plaintiff has to bear a substantial percentage of his own costs. The parties on both sides employed two counsel for the trial and each submitted that, if successful, the success should carry the costs of two counsel, which is only possible if costs were to be awarded on the high court scale. On appeal they also employed two counsel and agreed, correctly in my view, that the costs of two counsel were justified. It appears to me to be somewhat incongruous in those circumstances to hold that the trial costs should have been on the lower scale.

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[72] Compare *Delange v Costa* [1989] 2 All SA 267 (A); 1989 (2) SA 857 (A) at 861-862.

[50] Costs are within the discretion of the trial court and unless there is a demonstrable error this court cannot intervene. The high court correctly held that the mere fact that the case concerned defamation did not justify without more a costs order on the higher scale.[73] However, the court misdirected itself in my view by regarding the case as an ordinary run of the mill defamation case. The matters of principle involved justified in my view a costs order on the higher scale and also costs of two counsel.[74]

ORDER

[51] The following order is made:

1 The appeal is dismissed with costs, such costs to include the costs of two counsel.

2 The cross-appeal is upheld with costs, such costs to include the costs of two counsel.

3 The order of the court below is amended by substituting para 3 with 'Koste, insluitend die koste van twee advokate'.

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L T C Harms

Deputy President

[73] *Graham v Odendaal* 1972 (2) SA 611 (A); *Mogale & others v Seima* [2005] ZASCA 101; 2008 (6) SA 637 (SCA).

[74] *McKay v Editor City Press and another* [2002] 1 All SA 538 (SE).

GRIESEL AJA:

[52] Laughter can be a serious business with serious consequences, as the defendants in this case discovered to their detriment. They testified that their intention was not to injure the reputation of the plaintiff, but to make a joke. They also testified that the overwhelming reaction of the recipients of the manipulated picture was one of hilarity. Thus, to put their defence in a nutshell, the defendants maintained that the manipulated picture was not intended seriously and was not taken seriously.

[53] Trying to explain to others why we find certain jokes or situations humorous can be problematic. As it was graphically put by E B White:[75] 'Humor can be dissected as a frog can, but the thing dies in the process and the innards are discouraging to any but the pure scientific mind.' Nonetheless, attempts have been made from time to time to dissect humour. One of these attempts was by the British comedian, Rowan Atkinson (better known as *Mr Bean*), who explained that an object or a person can become funny in three different ways: by behaving in an unusual way; by being in an unusual place; or by being the wrong size.[76]

[54] It seems to me that this was what the defendants were trying to convey when pressed to explain the joke to the court below: they referred to the incongruity ('teenstelling') created by the manipulated picture. The defendants said what made the picture so funny – in their eyes and in the eyes of their fellow learners who saw it – was not the fact that it was so close to the truth, but that it was so very far removed from reality. The following extract from the second defendant's evidence in response to questions by the court illustrates the point:

'HOF: Wat is eintlik dan snaaks? U moet my verskoon, mnr Gildenhuys, maar as u nie eintlik 'n negatiewe konnotasie geheg het nie, dan wat was snaaks? --- Omdat dit sovêr van die werklikheid af is. Dr Dey is iemand wat hoë morele waardes voorgestaan het by die skool en . . . dit wat hy voor die

[75] US humourist and author (1899–1985) in *Some Remarks on Humor, Introduction*, accessed at http://www.quotationspage.com/quotes/E. B. White on 24 March 2010.

[76] http://en.wikipedia.org/wiki/Humour accessed on 24 March 2010.

skool gesê het is al wat ek van hom geken het, en dit was altyd goeie goed. Dit was hoë morele waardes.'

[55] The first defendant explained that what he found funny about the picture was the fact that it was so 'far fetched', namely to see the principal and the vice principal in such a compromising position. The third defendant said much the same. When asked, 'So dit is die teenstelling wat snaaks is?', he replied: 'Dit is definitief die kontras en die ironie.' (Rowan Atkinson would explain that the figures in the picture are depicted as behaving in an unusual way or being in an unusual situation.)[77]

[56] Prof Kriegler, an educational psychologist who was called as an expert on behalf of the defendants, lent theoretical support to their defence by explaining that often it is the element of incongruity that makes something funny:

'Teenstelling is soos in inkongruensie, twee goed wat eintlik glad nie bymekaar pas nie, soos sê nou maar ons sit Margaret Thatcher se gesig op 'n *Penthouse Pet* se lyf, dit sou snaaks wees omdat dit rym nie, dit hoort glad nie bymekaar nie. Maar dit is 'n komplekse onderwerp.'

[57] Further light is thrown on this 'complex subject' in the article by Prof Stern, quoted by my colleague,[78] where the author makes the following perceptive and apposite remarks:

'There exist as many classes of jokes as classes of values. There are jokes degrading intellectual values, others degrading moral values, esthetic values, religious values, vital values, instrumental values, economic values, etc.

. . . .

The number of anecdotes drawing their comic effects from a degradation of those moral values which characterize the erotic life is especially noticeable. On the one hand, we have the vigorous sexual passions; on the other hand, the rigorous restrictions of these passions

[77] Para 53 above.

[78] Para 18 above.

by ethics, religion, social conventions, and penal prohibitions. The individual can not escape the social pressure exerted by these conventions and taboos. He can violate them only at the risk of social and sometimes even of penal sanctions. The individual takes his revenge in trying, by means of jokes and anecdotes, to degrade those moral values of erotic life which the social and moral conventions and legal prohibitions try to protect. The laughter resulting from those degradations is for the individual a kind of symbolic liberation from a social pressure from which he suffers. When the individual ceases to suffer from the effect of those conventions and prohibitions, he is no longer so eager to degrade their value. Therefore, it is neither the old ladies nor the old gentlemen who tell us the most piquant stories.'

[58] The fact that the court – and the plaintiff – may find the defendants' attempt at humour banal or in bad taste or unamusing is neither here nor there. This does not transform a bad joke into a defamatory statement. In this regard I respectfully endorse what was said by Sachs J in the *Laugh it Off* matter[79] in a slightly different context:

'We are not called upon to be arbiters of the taste displayed or judges of the humour offered. Nor are we required to say how successful Laugh It Off has been in hitting its parodic mark. Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of bodies such as Laugh It Off to advance subversive humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts. . . . They chose parody as a means, and invited young acolytes to join their gadfly laughter.'

[59] With that prelude I turn to the first inquiry, namely to establish the natural or ordinary meaning of the picture in question. As rightly observed by the trial judge, any person who looks at the picture would immediately observe that it is not in fact a photograph of the plaintiff and the principal, but rather the product of amateurish manipulation. One is also struck by the fact that the principal (who, incidentally,

[79] *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)* 2006 (1) SA 144 (CC) para 108.

accepted the apologies of the defendants and did not take legal action against them) is depicted in the picture with a broad smile on his face, as if recognising the humour in the situation.

[60] If one were to apply the traditional test by postulating the reaction of hypothetical ordinary right-thinking persons generally, such persons who are outsiders to the particular school would not know or understand the context in which it was created or published: thus, they would not know the two men whose faces have been superimposed onto the naked bodies; they would not know their true character and disposition; they would therefore not see the incongruity in the situation; they would not recognise the strategically placed school emblems and would not understand the significance of those emblems in relation to the two figures depicted in the picture. They would not know that the picture was created and circulated by adolescent schoolboys in an attempt to poke fun at their principal and vice-principal. In short, such outsiders would not understand the 'natural and ordinary meaning' conveyed by the picture – as little as if a picture were shown to them bearing a subtitle in Mandarin. The subtitle in Mandarin would first have to be translated before the reasonable person of ordinary intelligence would be able to determine whether or not it carries a defamatory meaning. Here, the reasonable outsider would require a 'translation' of a different kind before being able to interpret the picture in question.

[61] The audience for which the picture was intended, namely the defendants and their fellow learners at the school, saw it quite differently. Some of them received it on their cell phones, others saw the printout that was made by the second defendant. Their reactions, while not decisive, were certainly significant. Being familiar with the context, they immediately recognised the attempt at humour and laughed at the incongruity conveyed by the picture.

[62] I pause here to deal briefly with *Masch v Leask*, referred to in my colleague's judgment.[80] There, the words used by the defendant – 'Dit lieg jij' ('You are telling a

[80] Para 9 above.

lie') – were defamatory per se. It was in that context that Wessels J said the following:

'It is perfectly clear that the *animus injuriandi* lies with the person who uses the words, but if a person utters words that are *per se* libellous, he is responsible for what he does, and he is responsible if he injures the business of another. If, therefore, he was to excuse himself that he merely spoke in jest, he must prove to the Court that it was in jest, and that the words must have been accepted as such by the by-standers.'[81]

The present situation is different: here, it cannot be held that the picture is defamatory per se and the court has to grapple with the natural and ordinary meaning thereof. It would be wrong, in these circumstances, to require the defendants to prove that it could be taken up in no other light by a reasonable person. The onus rests on the plaintiff to prove the defamation on which he relies and if it were to be found that the publication in issue is ambiguous or that doubt exists as to the meaning thereof, then the presumption of law is in favour of an non-injurious meaning.[82]

[63] The present situation is analogous to the defamation relied upon in *Mohamed v Jassiem*,[83] where the court held that it was defamatory to call someone 'an Ahmadi sympathiser', even though it was only understood in a defamatory sense by 'a tiny fraction of our national population' in the Western Cape Muslim community.[84] Likewise it would be inappropriate in this case to postulate the reactions of 'ordinary right-thinking persons generally', instead of restricting the inquiry to the microcosm comprising the particular school community and examining the way in which they understood the picture. Applying that test, the plaintiff has failed to prove, in my view, that the meaning conveyed by the picture is the one relied on in the particulars of claim. It follows that the claim based on defamation

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[81] At 116.

[82] Melius de Villiers op cit p 91.

[83] Note 5 above.

[84] At 703B–H.

fails at the first stage, with the result that it is not necessary for me to consider the other aspects raised in the erudite judgment of my colleague.

[64] Having said that, I accept, as does my colleague, that there is only one cause of action arising from the defendants' conduct herein. It is self-evident that whereas defamation invariably involves 'in the first instance an affront to a person's dignity which is aggravated by publication',[85] the converse is not always true; in other words, an affront to a person's dignity does not necessarily amount to defamation.[86] On the facts of this case, I am firmly of the view that the defendants' conduct amounts to an impairment of the plaintiff's dignity, not his reputation.

[65] Turning to the claim based on the impairment of the plaintiff's dignity, the requisites for this cause of action are 'firmly entrenched in our law' and do not require repetition.[87] Essentially, the concept of *dignitas* is a subjective one.[88] In the present matter, the plaintiff testified as to how he, subjectively, experienced the picture and its aftermath and how it negatively affected his own feelings of self-respect and dignity.[89] That evidence was accepted by the trial court and its findings in that regard have not been assailed on appeal. For the reasons given by my colleague,[90] I agree that it is not open to the defendants to rely on jest as a defence against the claim based on iniuria. It does not protect them in these circumstances where they foresaw the possibility that their attempts at humour might be perceived as insulting, offensive or degrading by the plaintiff.

[66] For these reasons and for the reasons furnished by Harms DP in relation to quantum and costs, I agree with the order proposed by him.

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[85] Para 23 above.

[86] Melius de Villiers op cit p 90.

[87] *Delange v Costa* 1989 (2) SA 857 (A) at 860I–861B.

[88] Ibid.

[89] Cf para 21 above.

[90] Para 9 above.

B M GRIESEL

Acting Judge of Appeal

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